Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1975

DOCKET NO. 75-175

JOHN IKE GRIFFITH
Petitioner-Appellant

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

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JURISDICTION

Indictment charged violation of 18 U. S. C 371 and 18 U. S. C. 1341

Motion to vacate judgment and sentence: 28 USC 2255

Denial of Due Process of Law. Fifth Amendment to U.S. Constitution

IN THE
SUPREME COURT OF THE UNITED STATES

October term, 1975

DOCKET NO.

JOHN IKE GRIFFITH
Petitioner-Appellant

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

JOHN IKE GRIFFITH, pro se
Address:
Box 147, Route 1,
Dutton, Alabama 35744.

ISSUES PRESENTED FOR REVIEW

1. Whether unreasonable and purposeful pre-indictment delay of legal processes by the Government which caused actual prejudice to Petitioner's right to have a fair trial violates the Due Process Clause of the Fifth Amendment to the Constitution of the United States of America.

2. Whether or not it was hurtful, harmful, and prejudicial error of the trial court in the U. S. District Court, Southern Division, Northern District of Alabama to overrule Petitioner's three motions as follows:

(a) "Motion Requesting Oral Evidentiary Hearing on Petitioner's Section 2255 Motion, AND ON MOTION REQUESTING BIRMINGHAM and/or ALABAMA U. S. DISTRICT JUDGES TO RECUSE THEMSELVES

(b) MOTION REQUESTING BIRMINGHAM AND ALABAMA U. S. DISTRICT JUDGES TO RECUSE THEMSELVES

(c) MOTION REQUESTING THE HON. CLARENCE W. ALLGOOD, U. S. DISTRICT JUDGE TO RECUSE HIMSELF FROM HEARING PETITIONER'S SECTION 2255 MOTION. (Citing: Montgomery v. U. S. (5 Cir. 1972) 469 Federal 2nd 148 and cases cited therein.)

3. Your Petitioner, John Ike Griffith, was denied effective assistance of counsel. Such denial of effective assistance of counsel amounted to a denial of due process of law.

4. Over 140 separate items of illegal evidence obtained by illegal search and seizure were erroneously introduced against your Petitioner, which fact was hurtful, harmful, and prejudicial error on the part of the court. Further 2,000 court files were improperly and illegally brought into the court room and introduced as evidence against your Petitioner which was hurtful and harmful error on the part of the court. Citing: **Stanford Daily,** et al vs. **Zurcher,** et al No. 7191 2, REP United States District Court, Northern District of Calif.)

5. Your Petitioner, John Ike Griffith, suffered harsher punishment by taking a jury trial and pleading not guilty, which denied him due process of law.

6. The evidence used against your Petitioner was obtained by illegal surveillance or illegal "bugging" or illegal electronic devices and by unauthorized persons in violation of law — and thus incompetent as evidence — which resulted in erroneous and illegal judgment against your Petitioner.

7. That witnesses Mrs. Sue Cook, Mrs. Shirley Bowman, and prospective witness French O. Whitten, Jr., were under indictment in this case — except that Mrs. Sue Cook was under the threat or prospect of indictment in this case — and that the testimony of Sue Cook and Shirley Bowman — and the plea of guilty by F. O. Whitten, Jr., was "colored" and not truly given — for that they were constantly held in threat of greater punishment/by the court if they did not testify against your Petitioner in this case. And, because of that continuing threat and/or intimidation — they testified in a "leaning" and "colored" manner and not freely and truly because of that threat that hung heavy over their heads.

8. That the evidence introduced in this case shows that the use of the mails was purely incidental, and a remote after-the-fact thing with the general operation out of which grew the mail fraud charges against your Petitioner, wherein he was charged with conspiracy to use the mails to defraud. And, thus the judgment was erroneous and void against your Petitioner. (Cited: **United States** vs. **Thomas E. Maze,** Case No. 72-1007.)

9. WHERE IT SHOWS IN EACH COUNT OF FIVE COUNTS OF THE INDICTMENT THAT THE ACTS OR CONDUCT COMPLAINED OF HAPPENED FIVE YEARS BEFORE THE INDICTMENT WAS HANDED DOWN, OR MORE THAN FIVE YEARS BEFORE THE INDICTMENT WAS HANDED DOWN, DOES THIS CONSTITUTE PRE-INDICTMENT DELAY THAT PREJUDICED THE ABILITY OF THE PETITIONER TO DEFEND HIMSELF SUCH AS TO DENY TO THE DEFENDANT — YOUR PETITIONER DUE PROCESS OF LAW AS PROVIDED FOR IN THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

FACTS, AND STATEMENT OF THE CASE

On August 20, 1970, Petitioner, with others, was charged by grand jury indictment with one count of conspiracy (18 USC 371) and five substantive counts of mail fraud (18 USC 1341).

Following jury trial thereon, petitioner was found guilty on all counts and on April 16, 1971, was sentenced to concurrent five-year terms on Counts One, Two and Three, and was placed on probation for three years on Counts Four, Five and Six. He was also fined $10,000.00 and costs. The other defendants charged in the indictment pleaded guilty (Whitten) **or nolo contendere** (Bowman and Love) prior to trial.

A direct appeal was then duly perfected, this Court affirming the conviction in all respects. **United States** v. **Griffith,** 453 F. 2d 1207, 5th Cir. (1972), **cert. den.** 92 S. Ct. 2059, 406 U. S. 957.

Having completed serving the custodial portion of his sentence, Petitioner filed in the District Court his motion under 28 U S. 2255 to vacate and set aside the judgment and conviction which was denied by the District Court on on November 7, 1974. On March 25, 1975, the Fifth Circuit Court of Appeals Per Curiam: Affirmed the order of the U. S. District Court. And on June 3, 1975, the Fifth Circuit Court of Appeals denied the Petitioner's APPLICATION FOR REHEARING.

Your Petitioner is or was a practicing attorney at law in the city of Birmingham for some 34 years from 1938 to or near the date of the indictment in 1970.

Petitioner's specialty in the practice of law was domestic relations. In 1945 the Legislature of the State of Alabama by official act approved by the Governor of the state amended Title 34 Sections 27 and 29 by adding the following words. "Provided, however the provisions of this section shall not be of force and effect when both parties are before the court." That left Title 34 Sections 27 and 29 of the Alabama Code to hold in effect that the one years' residence period of time for the complainant or the respondent to live in Alabama prior to filing a complaint in Equity Court for a divorce was waived or not required when

both parties signed the court pleadings voluntarily submitting to the jurisdiction of the Alabama Court. The signed answer and waiver of the respondent voluntarily submitting to the jurisdiction of the Court had the same legal effect as if both parties were physically before the Court in the court room.

Hundreds of Alabama attorneys operated under the provisions of Title 34 Sections 27 and 29 since the year 1945 had obtained divorces for their clients for a period of 20 years or longer. Finally the Alabama Bar Association after many attempts to get the State Legislature to amend Title 34 Sections 27 and 29 to provide a long period of residence to obtain a divorce in the State of Alabama — having failed in each attempt with the State Legislature — did promulgate Rule 25 — which in effect amended the Code Section 27 and 29 of Title 34 of the Alabama Code. Your Petitioner, John Ike Griffith, and a few fellow Alabama attorneys took the position that the Alabama Code Title 34 Sections 27 and 29 could be amended by an act of the State Legislature — not by a Rule A of the Alabama Bar Association.

The Alabama press — the newspapers of the State of Alabama — particularly the Birmingham News and the Birmingham Post-Herald started a crusade against divorces having a base residence period of time of short duration under Title 34 Sections 27 and 29. The press invented or coined the phrase "quickie divorce." The press or newspapers slanted their articles of news on the subject to make the lawyers participating look like villians. The press slandered said lawyers, the Alabama Bar Association having been encouraged by the fantastic stories of the press — did proceed to disbar your petitioner, John Ike Griffith, for what he considered legitimate law practice.

In the disbarment proceedings the Bar Association denied your petitioner at least six items or provisions of due process of law. Included were, right to trial by jury, venue or right to be tried in the county where he resided, right to be confronted with witnesses appearing against him, right to have the competency of the evidence presented against him ruled upon by competent legal authority, and many others too numerous to include here in at this time.

Many citizens of the United States sought a divorce in the most favorable jurisdiction, and many considered Alabama to be the most favorable jurisdiction. Also many citizens of the United States did seek out and request your petitioner to represent them in their law suit for a divorce in the Equity Courts of the State of Alabama. Said United States citizens at all times sought out your petitioner and engaged him, and petitioner at no time solicited the contractual empoyment of their attorney. But after he was employed as their attorney he did appear for them as attorney in fact and of record.

Then the Bar Association representatives and officials in cooperation with a campaign of the local press to villify, crucify, and slander, injure, and damage the good name and good character of your petitioner, did induce the U. S. District Attorney's office to conduct an illegal search of petitioner's law-office; did present perfectly legal acts of petitioner in a warped, biased, prejudiced, and in out of context manner to a Grand Jury to obtain an indictment against your petitioner. That during the trial of this case your petitioner was crucified by the press so that he could not have a fair trial.

That the whole controversy in this case covered a long period of years wherein the Bar Association tried but failed to get the State Legislature of the State of Alabama to amend the law on the subject of period of time for residence in order to obtain a divorce in Alabama. But failing to get the legislature to amend the Alabama law — Alabama Code Title 34 Sections 27 and 29 — they did put an illegal force and squeeze on your petitioner by the adoption of Bar Association Rule 25A — and illegally enforced the same — contrary to State statute to the detriment of your petitioner in that he has been imprisoned in the Federal Correctional Institution at Texarkana, Texas, for a sentence of five (5) years. His civil rights have been taken away from him in that he has been denied the privilege of earning a livelihood by engaging in legitimate law practice in the State of Aabama; that his good name has been disparaged and held up to shame and disgrace by the Birmingham News and the Birmingham Post-Herald; that he has suffered shame

and disgrace in the eyes of his friends and associates by having been held up to scorn by the said press; that his constitutional rights have been denied him in numerous ways — including illegal search and seizures.

That since the trial of this case before the United States District Court of Birmingham, Alabama, the State of Alabama has amended Title 34 Sections 27 and 29 of the Alabama Code to effect a six month period of time as the residence required to obtain an Alabama divorce — which is a tacit admission that your petitioner was acting legally — and doing legitimate law practice by obtaining divorces for his clients in a shorter period of time as provided by Title 34 Sections 27 and 29 before the amendment by the legislature subsequent to the trial of your petitioner.

That the trial court erroneously overruled all supporting motions to Petitioner's Title 28 Section 2255 Motion including Motion for evidentiary oral hearing, and Motions requesting the Judge or Judges who were members of the Alabama and Birmingham Bar Associations to recuse themselves on account of conflict of interest — since the action against the Defendant was a Bar Association prosecution (See trial transcript pages 1174 to 1189 all inclusive.)

That a sworn affidavit by Charles E. Davis is reproduced in total on pages 6 through 10 of the REPLY BRIEF OF APPELLANT-PETITIONER. In that affidavit Charles E. Davis, while acting as postal inspector did confess to continued surveillance of the U. S. mails of John Ike Griffith, and Petitioner contends that such surveillance and search of Defendant's offices were illegal surveillance and illegal which disqualified the materials which were introduced as evidence — and made the evidence incompetent — and harmful error to the prejudice of the defendant — Petitioner — thus denying him due process of law.

BEST COPY AVAILABLE

ARGUMENT TO ISSUE NO. 1 PRESENTED FOR REVIEW

Contested fact issues in Section 2255 Motion cases must be decided on the basis of an Evidentiary Hearing, not affidavits. Citing: **Montgomery** v. **U. S.** (5 Cir. 1972) 469 Federal 2nd 148 and cases cited therein. The trial court based its order denying Petitioner's motion on the grounds of res adjudicata. The rule of res adjudicata does not apply to a collateral attack on the original judgment of conviction and sentence. **Heflin** v. **U. S.** (1959) 358 U. S. 415, 79 S. Ct. 451, 3 L. Ed. 2nd 407; **Breaton** v. **U. S.**, (8 Cir. 1962) 303 F. 2nd 557; **Birchfield** v. **U. S.**, (5 Cir. 1961) 296 F. 2nd 120.

2255 Motion is by statute a collateral attack on the original sentence which was imposed in violation of the Constitution. The Supreme Court, in the case of **U. S.** v. **Marion** (1971) 404 U. S. 307, stated as follows:

"This appeal requires us to decide whether dismissal of a federal indictment was constitutionally required by reason of a period of three years between the occurrence of the alleged criminal acts and the filing of the indictment."

The Supreme Court reversed and remanded the Marion case and stated the pre-indictment delay violated the Due Process Clause if there was actual prejudice to the conduct of the defense, or if there is a showing that the Governent intentionally delayed to gain some tactical advantage over Appellee or to harrass him.

In your Petitioner's case at issue now, we believe waiting for the disbarment action gave the Government tactical advantage.

Petitioner's sworn petition alleges in substance as follows:

That he was a member of the Alabama State Bar Association from about March, 1937, until about October, 1968, and up to this date had an outstanding good record before the Bar Association. That about the year 1964 the Bar Association began an investigation on so called quickie divorces on various attorneys all over the State of Alabama. That during the year 1965 or prior thereto the U. S. At-

torney's office, the Alabama and Birmingham Bar Association, and other officials were aware of the movements and prevalence of the quickie divorce actions in the State of Alabama. That from 1965 until 1970, a lapse of five years transpired without any indictment. That the same evidence and information was available in 1965 to obtain an indictment against your Petitioner if there were a violation of law. That during such five year period the Alabama Bar Association and the Birmingham Bar Association took, or caused to be taken, the following steps, with the full knowledge of the U. S. Attorney's Office.

1. Made repeated unsuccessful efforts to have the Alabama State Legislature repeal the Hooten Amendment which provided for quick divorces — as alleged in the indictment, etc.

2. Adopted a rule restricting divorces obtained under the Hooten Amendment — allowing both parties to voluntarily submit to the jurisdiction of the Alabama Equity Courts.

3. Attempted to disbar Circuit Judge Bob Moore, Jr. — and Petitiner's co-defendant French O. Whitten, Jr.

4. Instigated disbarment action against Petitioner in the year 1964 — and continued the disbarment action over 3 or 4 years.

5. In the year 1965 and 66 offered immunity to the Petitioner if he would surrender his license to practice law for one year.

6. Immediately after Petitioner's disbarment was finalized by denial of certiorari by the U. S. Supreme Court, caused an indictment to be returned by the Federal Grand Jury. Ali members of the Jury were advised of Petitioner's disbarment at the commencement of the trial — and repeatedly during the trial.

THE PETITIONER'S 2255 MOTION WAS DENIED WITHOUT AN EVIDENTIARY HEARING. (Court Order).

ISSUE NO. 2. DID THE U. S. DISTRICT TRIAL JUDGE COMMIT HURTFUL, HARMFUL, PREJUDICIAL, AND REVERSIBLE ERROR BY SUMMARILY DISMISSING OR OVERRULING PETITIONER'S 2255 MOTION; Pe-

titioner's MOTION REQUESTING BIRMINGHAM AND ALABAMA U. S. DISTRICT JUDGES TO RECUSE THEMSELVES: Petitioner's Motion REQUESTING THE HON. CLARENCE W. ALLGOOD, U. S. DISTRICT JUDGE TO RECUSE HIMSELF FROM HEARING Petitioner's 2255 MOTION; and on Petitioner's Motion REQUESTING BIRMINGHAM AND ALABAMA U. S. DISTRICT JUDGES TO RECUSE THEMSELVES?

Petitioner practiced law before the U. S. District Court for 34 years, — and received no notice from the Court that he is barred. His signing per se pleadings do carry legal effect. Thus, all the motions need not necessarily be sworn to. Yet, his 2255 Motion was sworn to. It set out details of fact upon which other motions were based. Petitioner's Motion for the Hon. Clarence W. Allgood to recuse himself was sworn to. Each of the motions set forth facts sworn to in the Petitioner's Section 2255 Motion that supports the other motions. And, each MOTION carries facts that give the Motion its own merit. And, his legal brief is sworn to as to the facts alleged — thus giving legal effect to the matters and things set forth in each separate MOTION. A careful reading of each Motion will give clear understanding of the just legal effect of each motion. All through the transcript of the trial of the case, — it clearly appears that the action was an attempt on the part of the Birmingham Bar Association, and the Alabama Bar Assocition to use the resources of the United States District Court . . . . .

to enforce its rule of ethics with respect to so-called quickie divorces. The Bar Association officials signed the affidavits for the search warrant, assisted directly in the search, and offered testimony of several Bar Association officials in the trial proceedings. And, the purpose of the evidentiary hearings requested by the Motions was to bring these facts out emphatically as evidence in the hearings. Petitioner verily believes he can not have due process of law when the U. S. District Judge trying the case is a member of that same Bar Association sponsoring the prosecution — as there does not exist the required legal separation of powers to give the Petitioner a fair and impartial trial.

ARGUMENT ON ISSUE NUMBER 2

Contested fact issues in Section 2255 Motion cases must be decided on the basis of an EVIDENTIARY HEARING, NOT AFFIDAVITS. Citing: **Montgomery** vs. **U. S.** (5 Cir. 1972) 469 Federal 2nd 148, and cases cited therein.The trial court based its order denying Petitioner's motions on the grounds of res adjudicata. The rule of res adjudicata does not apply to a collateral attack on the original judgment of conviction and sentence. **Heflin v. U. S.** (1959) 358 U. S. 415, 79 S. Ct. 451, 3 L. Ed 2nd 407; **Breaton** v. **U. S.** (8 Cir., 1962) 303 F. 2nd 557. **Birchfield** v. **U. S.** (5 Cir. 1961) 296 F 2nd 120.

These matters and things set forth in Petitioner's Section 2255 Motion that require oral evidentiary hearing, such as: to put Postal Inspector Charles Davis on the witness stand and fully cross examine him — and examine him in chief about his full conduct of illegal surveillance of Petitioner's mail over a long period of time; facts pertaining to and surrounding the membership of the local U. S. District Judge, or Judges in the Alabama and Birmingham Bar Associations: contents of a letter the trial judge read after the trial was over and before sentence that "biased" him.

3. ISSUE NO. 3. PETITIONER WAS DENIED EFFECTIV ASSISTANCE OF COUNSEL. SUCH DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL AMOUNTED TO A DENIAL OF DUE PROCESS OF LAW.

Petitioner hired William B. McCollough, Jr., to handle his case and conduct the actual trial and defense before the court. Your Petitioner paid William B. McCollough, Jr., in advance. After the trial had proceeded for three days, William B. McCollough, Jr., became desperately ill and had to go into the Baptist Hospital in Birmingham,Alabama, for treatment. He was absent from the trial while the trial was in progress for two and one-half days. When Mr. William B. McCollough's illness was first announced your Petitioner made his own motion in open court requesting a continuance of the case, or requesting a mistrial, on account of the illness and disability of his attorney William B. McCollough, Jr. Petitioner's Motion for a Continuance was denied by the trial judge. And the trial Judge ordered the

trial to proceed without Mr. William B. McCollough, Jr., to represent your Petitioner. The court ordered your Petitioner to proceed with another attorney — a Mr. Nicholas Callahan. Petitioner did not hire Nicholas Callahan, for he was a very young attorney with little trial experience. Further he was not fully versed in the case as was Mr. William B. McCollough, Jr. After your Petitioner was forced to proceed with the trial for two and one-half days without Mr. William B. McCollough, Jr., your Petitioner repeated his motion in open court requesting a continuance of the case on account of the absence of his duly employed attorney, Mr. William B. McCollough, Jr. This Motion was recorded on transcript of the trial at pages 914, 915, 916, and 917. It developed later in the trial that Mr. Nichoas Callahan was hostile to your Petitioner. See paragraph ten, page 34 of Petitioner's Section 2255 Motion, which is sworn to. Also see paragraph 9, page 34 of Petitioner's Section 2255 Motion, which is sworn to.

The Appellate Court's attention is especially called to paragraphs TWO through TWENTY-ONE, on pages 31 through 38 wherein is set out in details twenty additional grounds, charges, or items, or incidents — faults and short comings of his counsel that contributed to the denial of effective counsel — which amounted to a denial of DUE PROCESS OF LAW. These are set out fully in Petitioner's Section 2255 Motion — and for the sake of brevity the Court's attention is invited to them — rather than to expand this brief too long.

ARGUMENT ON ISSUE NUMBER 3

The Sixth Amendment to the United States Constitution guarantees to me effective assistance of counsel, and effective representations. The court's ruling denying a continuance of the case when the Petitioner's counsel became sick and went to the hospital, made Petitioner's counsel **ineffective.** See transcript of trial pages 914, 915, 916, and 917. All the foregoing facts the record shows without dispute. What the record can not show is the influence these facts had on Petitioner's trial. But it is submitted that "the

right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial" **Glasser** v. **United States,** 315 U. S. 60, 76 (1962); **Uveges** v. **Pennsylvania,** 335 U. S. 437 (1948). "Continuance may or may not have been useful to the accused, but the importance of the assistance of conusel in a serious criminal charge after arraignment is too large to permit speculation on its effect." **Hawk** v. **Olson** supra at 278; **Hobbs** v. **Peperxack,** 301 F 2nd 875 (4 Cir. 1962). See Glasser v. U. S. at 62 S Ct. 467. **Lollar** v. **U. S.** 276 F 2nd 243 **Johnson** v. **U. S.** 304 U. S. 458-465; 58 S. Ct. 7019, 82 L Ed. 1461.

The constitutional requirement of representation is one of substance, not of form.**Avery** v. **Alabama,** 308 U. S. 444, 446; 60 S. Ct. 321; 89 L. Ed. 377 (1940) "Petitioner was entitled to effective aid in the preparation and trial of this case." **Powell** v. **Alabama,** 287 U. S. 45, 71; — 53 S. Ct. 55, 65; — 77 L. Ed 158 (1932) **Gideon v. Wainwright,** 372 U. S. 335; 83 S Ct. 792; — 9 L. End. 2nd 799 1963).

Petitioner John Ike Griffith's case at Bar sets out plain case on its face that the court caused the Petitioner to suffer prejudice to the extent that it could not be cured by instructions. The court excused counsel retained by Petitioner — and against Petitioner's will denied the Petitioner's case to be continued. See the transcript, pages 915 lines 15 to 20 inclusive. It states: "MR. GRIFFITH: May it please the court, for the record I respectfully renew my MOTION for a mistrial, or in the alternative a MOTION for a continuance until my attorney, Mr. McCollough, is in — is personally in this court room to defend me." The Petitioner's case makes a prima facie case of a plain error by trial Judge which on its face requires the judgment and conviction set aside and the case be reheard on the merits. **Robins** v. **U.S.,** Case No. 71-5405 decided Jan. 17, 1972. Cited as 740, 741, and 742, Memorandum Case 30 L. Ed Vol 7. Said at page 742 supra: " Lawyers are not necessarily fungible goods to be replaced at the whim of the Court. Counsel's prior experience in a case, his familiarity with the facts and prior proceedings and the position of trust he may have gained with the defendant are factors arguing for continued representation by the same attorney." Thus

Petitioner prays for the Sixth Amendment protection of the United States Constitution granting unto him effective counsel — and DUE PROCESS OF LAW.

ISSUE NO. 4. OVER 140 SEPARATE ITEMS OF ILLEGAL EVIDENCE obtained by illegal search and seizure were erroneously introduced against your Petitioner, which fact was hurtful, harmful, and prejudicial error on the part of the Court. FURTHER 2,295 court files were improperly and illegally brought into the court room and introduced as evidence against your Petitioner which was hurtful and harmful error on the part of the Court. Citing: **Stanford Daily,** et al v. **Zurcher,** et al No. 7191 2, REP U. S. District Court, Northern District of Calif.

STATEMENT OF FACT

These files were courthouse files from an adjoining county ,St. Clair County, Alabama, where Judge French O. Whitten was presiding as the duly elected Circuit Judge and in the office of the circuit judge. When Judge Whitten left the office at the end of his elected term of office Charles E. Davis, the postal inspector with the aid and assistance of officials of the Alabama and Birmingham Bar Association without legal procedure provided by law which was subpoenia duces tecum, confiscated the files, without search warrant, without subpoenia duces tecum, and stacked them in the court room on huge dollies before the jury. Without identifying each file with respect to showing whether or not John Ike Griffith's name appeared on each of the files or any of the files, they were offered into evidence. Over the timely objections of the defendant, the court committed harmful error on the part of the Court. Citing: Stanford Daily house files to be introduced into evidence against your Petitoner. Since the trial date, April, 1971, an outstanding federal case has been decided on this very subject - and is on all fours with this very proposition, and held that it was illegal to admit such files from another court and files of the state, to be removed from the courthouse and transported into another county, without proper subpoenia duces tecum and introduced into evidence. This is the

signal and outstanding case of **Stanford Daily, et al** vs. **Zurcher et al** No. 7191 2, REP U. S. District Court, Northern District of California — It is final and in force and effect holding for the defendant. And, it covers this exact proposition of law — holding that the courthouse files could not be legally introduced into evidence in the manner in which it was done.

ARGUMENT TO ISSUE NUMBER 4

It was highly hurtful, harmful, and prejudicial against the Petitioner for these 2,295 court files stacked in huge boxes, on huge dollies, to be setting directly in front of the jury all during the trial of the case, and especially so when they were improperly and illegally in evidence and illegally displayed right before the jury all the way through the trial. It would be equal to displaying a mutilated corpse of a human body on a table right in front of the jury all through the trial when the body was illegally introduced into evidence. It was the basis of bias and prejudice on the part of the trial judge — and on the part of the jury as well. And, was an illegal burden of prejudice and bias too great for the Petitioner to overcome. Hence we urge this as great and signal cause for reversal — and new trial — and dismissal.

FACTS ABOUT THE ILLEGAL SEARCH WARRANT, AND THE ILLEGAL EVIDENCE INTRODUCED AS A RESULT OF THE ILLEGAL SURVEILLANCE OF PETITIONER'S MAIL

Title 34, Section 27 and 29 of the Code of Alabama, provides for obtaining of divorces as was the cases at bar. So, they were legal. And, the trial Court erroneously ruled against the introduction of 17 such cases decided favorably as legal by the Supreme Court of the State of Alabama as to the legality of the same. So, the acts of the defendant, your Petitioner, in presenting the cases for the clients were perfectly legal acts. Therefore, it was an illegal act on the part of the postal inspector, Charles E. Davis, to carry on illegal inspection of, and illegal surveillance of the Pe-

titioner's mail over a period of months. And, it was also illegal for Charles E. Davis, the postal inspector, along with officials of the Alabama and Birmingham Bar Associations to illegally search the office of John Ike Griffith and carry therefrom 140 items of illegal evidence — when the same were not listed in the search warrant. The search warrant was illegal for that it was based on affidavits of officials of the bar associations on MERELY INFORMATION AND BELIEF, SUSPICION, NOT FACT, and on the false PRESUMPTION that the acts of the Petitioner were illegal acts — when as a matter of fact — all of the acts of the Petitioner were valid and legal acts incidental to his doing business as an attorney at law.

The import of these affidavits, taken as a whole, is merely an assertion of SUSPICION that the material sought in the warrant is located at the premises sought to be searched thereby. No one of these affidavits contain an affirmative allegation based on the personal knowledge that the items sought to be seized were present upon the premises searched. Nor do the offidavits taken together afford a sufficient basis upon which a finding of probable cause could be made. **Aguilar** v. **Texas,** 378 U. S. 108, 12 L. Ed. 2nd 723 84 S. Ct. 1509. See also **United States** v. **Upshaw,** et al, 5th Cir., No. 288808, July 9, 1971.

Furthermore, it appears from these affidavits that the only basis upon which the commissioner could have made a determination that the provisions of 18 USC 1341 had been violated by defendant was the opinion of one of the affiants. This is not such an affirmative allegation as will satisfy the requirements of **Aguilar** v. **Texas** supra. An affiant's opinion is no more sufficient than is his SUSPICION OR BELIEF.

ARGUMENT TO ILLEGAL SEARCH AND SEIZURE

The divorces were legal. Search and seizure of legal papers is not a crime. The whole theory of the Government's case is that the divorces were illegal because they were not filed. The Supreme Court of Alabama held that failure to file does not void the divorce decree. Johnson vs. Johnson 182 Alabama 376; 62 Sou. 760. What made the divorces legal was the fact that the final divorce decrees were signed by a duly elected, duly constituted circuit judge French O. Whitten, Jr., who personally signed each and every one of the final divorce decrees. The Birmingham newspapers took out after quickie divorces to help them sell newspapers because it made an interesting story. The Bar Association passed their Rule 25A against quick divorces. But, their rule 25A was void and of not legal force and effect because it conflicted directly with the written provisions of the Alabama law - legislative Act known as the Hooten Act - written as Title 34, Section 27 and 29 of the Code of Alabama, providing for the obtaining of quick divorces when both parties on their pleadings voluntarily submitted to the jurisdiction of the Alabama equity courts by both joining in the proceedings on the pleadings - by signing the answer and waiver, signing the bill of complaint, signing their testimony, etc. etc. Too the Supreme Court of Alabama upheld the validity of the so called quickie divorces on each one of the cases that reached the Supreme Court on Appeals. There were at least 17 of those cases — and we list some hereinbelow in "Petitioner's Exhibit A." The fact that Judge F. O. French, Jr., filed the divorce cases in his private office, rather than in the clerk's office — to avoid adverse criticism by the newspapers — did not make the divorces illegal. And, since they were legal — it was illegal for the postal inspectors — and the bar association officials to illegally confiscate these cases by illegal search and seizure.

And further it was harmful, hurtful, and reversible error on the part of the court to rule that the same could be introduced into evidence against your Petitioner — which said errors were repeated in many instances all the way through the trial of the cause. No legally constituted court has avoided any of the divorce cases complained of and introduced against this defendant. We submit that at least one of the divorce cases would have been required to be held void and illegal by a competent court — before any of the evidence introduced against this Petitioner could have been ruled to be competent evidence. Hence, Petitioner prays for a reversal.

ISSUE NO. 5. THE PETITIONER, JOHN IKE GRIFFITH, SUFFERED HARSHER PUNISHMENT BY TAKING A JURY TRIAL AND PLEADING NOT GUILTY, WHICH DENIED HIM DUE PROCESS OF LAW.

By protecting his Fifth Amendment RIGHT TO A JURY TRIAL, the trial Court erred in throwing the whole book at the Petitioner. The Government made a bargain with co-defendant Ann Love and Shirley Bowman that they would receive no sentence. The Government accepted a bargain plea from French O. Whitten, Jr., for a six (6) months sentence. He at the time alleged in the indictment was a circuit judge for the 30th Judicial Circuit of the State of Alabama, and performed his duties at courthouses located at Pell City, Alabama, and Ashvile, Alabama. Mrs. Ann Love was register in Chancery court in Pell City, Alabama. Shirley Bowman was secretary in the office of John Ike Griffith. The Petitioner at Bar was only performing his honest and required duties as an attorney, and after disbarment as Legal Advisor Counsel, which at no time after his disbarment did he appear in a court as an attorney, but only did the paper work as Legal Advisor. The Petitioner's sentence is cruel and unusual. The Petitioner was sentenced to a period of five (5) years, fined $10,000.00 and three (3) years probation to follow the sentence.

ARGUMENT TO ISSUE NUMBER 5

We here refer to **Thomas v. United States,** 368 F. 2nd 911 (1966). The Court of Appeals, Rives, Circuit Judge held that Defendant who apparently received harsher punishment than would have been decree had he waived his Fifth Amendment rights after trial, and they stated that he had been proved guilty by overwhelming evidence, and that if he came clean, court would take that into account in length of sentence to be imposed, but if he persisted denying guilt court would take that into account, paid a judicially imposed penalty for exercising his Constitutionally guaranteed rights so that there was little doubt as to authority and duty of District Court to vacate sentence and no doubt as to authority of Court of Appeals under its

supervisory power to do so. See also: **United States** v. **Wiley,** 278 F. 2nd 500 at pages 504, 506, 507.

Nor can the disparity in sentence imposed here be justified on the ground that Viley asked for a trial, as we said in our former opinion: 267 F. 2nd at page 456:

"The defense certainly was not frivolous nor does it appear to have been presented in bad faith."

"Our part in the administration of Federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, and even though his efforts prove unsuccessful. It is evident that the punishment imposed by the District Court on Wiley was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted."

Even during the progress of the trial of the Petitioner the pressure to get him to plead guilty was continued. Because he refused he was given the harsher sentence for the "so called" crime of obtaining as a lawyer — divorces for his clients, which is NOT a crime.

ISSUE NO. 6. THE EVIDENCE USED AGAINST YOUR PETITIONER WAS OBTAINED BY ILLEGAL SURVEILLANCE OR ILLEGAL "BUGGING" OR ILLEGAL ELECTRONIC DEVICES AND BY UNAUTHORIZED PERSONS IN VIOLATION OF LAW — AND THUS INCOMPETENT AS EVIDENCE — WHICH RESULTED IN ERRONEOUS AND ILLEGAL JUDGMENT AGAINST YOUR PETITIONER.

STATEMENT OF FACT OF ISSUE NO. 6

The facts, figures, things, information made the basis of the charges in case No. CR-70-282, United States vs. John Ike Griffith, in the U. S. District Court, Sou. Div., Northern District of Ala., were obtained by illegal search and seizure — and by the Chief Postal Inspector, Charles E. Davis, by illegally and unlawfully "bugging," or unlawful survellance, and illegal and unlawful inspections of your

Petitioner's mail. Mr. Charles E. Davis was assisted by one or more postal inspectors — and further assisted by officers of the Ala. and Birmingham Bar Associations. And, because this evidence was so illegally and unlawfully obtained — it was unlawfully and illegally introduced into evidence against your Petitioner. And, your Petitioner has reasonable cause to believe that illegal electronic devices were used both against your Petitioner's mail, and by and on his private telephone, and against his private premises where he conducted his business. Sixth Amendment to the Constitution of the United States.

Inspector, Charles E. Davis, was not a legally authorized officer with authority to conduct the illegal search and seizure of Petitioner's office. Yet, he took over 140 items not mentioned in the search warrant from Petitioner's office — and introduced them into evidence. And, he introduced numerous items of evidence which he illegally obtained by "illegal bugging" or by illegal wire tap, or by illegal surveillance of Petitioner's offices.

Many days, weeks, and months before evidence was presented to the grand jury, it came to the attention of Petitioner that his mail was being "bugged" or illegally inspected when a U. S. postal mail carrier came to and told a friend of your Petitioner, one Mr. Carl B. Carter, that John Ike Griffith's mail was being "bugged" or illegally inspected, And, the U. S. postal carrier remarked at the time. "If I tell who is doing the illegal inspections, or the illegal surveillance I will be fired from the employment of the U. S. Post Office." "So, I can not tell you who is doing the "bugging" of John Ike Griffith's mail."

ARGUMENT TO ISSUE NO. 6

Petitioner requested oral evidentiary hearing for the purpose of being permitted to put U. S. Postal Inspector Charles E. Davis, and officers of the Birmingham and Alabama Bar Association on the witness stand to give full details in questions of discovery as to what "bugging" and what illegal surveillance they did do of John Ike Griffith's U. S. mail. A summary judgment of denial by the U. S.

District Judge of this Motion for EVIDENTIARY HEARING for this purpose and other purposes was hurtful, harmful, and prejudicial error on the part of the court. And, for this reason the Court's order denying the evidentiary hearing should be reversed.

The Court of Appeals for the Third Circuit in **U. S. v. Morin,** 265 F 2nd 241, 245 (1969), made the following statement appropriate to the issue therein: "IT APPEARS EQUAILY WELL SETTLED THAT WHERE A PRISONER ON A MOTION UNDER SECTION 2255 ALLEGES FACTS WHICH, IF TRUE WOULD CONSTITUTE A DENIAL OR INFRINGEMENT OF CONSTITUTIONAL RIGHTS SO AS TO RENDER THE JUDGMENT VULNERABLE ON COLLATERAL ATTACK, IT IS INCUMBENT UPON THE DISTRICT COURT TO ORDER THE PRODUCTION OF THE PRISONER AND HAVE A HEARING ON THE CONTESTED OR CONTROVERTED QUESTION OF FACT."

The matter seems to have been well settled by the United States Supreme Court in **U. S. v. Hayman,** supra, the Court said with respect to this problem: "THE ISSUES RAISED BY RESPONDENT'S MOTION WERE NOT DETERMINED BY THE 'FILES AND RECORDS' IN THE TRIAL COURT. IN SUCH CIRCUSTANCES, SECTION 2255 REQUIRES THAT THE TRIAL COURT ACT ON THE MOTION AS FOLLOWS: — CAUSE NOTICE THEREOF TO BE SERVED UPON THE UNITED STATES ATTORNEY, GRANT A PROMPT HEARING." - - - "WE CONCLUDE THAT THE DISTRICT COURT DID NOT PROCEED IN CONFORMITY WITH SECTION 2255 WHEN IT MADE THE FINDINGS ON CONTROVERTED ISSUES OF FACT RELATING TO RESPONDENT'S OWN KNOWLEDGE WITHOUT HIS BEING PRESENT."

ISSUE NO. 7. STATEMENT OF FACT, LAW CITATIONS — ARGUMENT

GOVERNMENT'S WITNESSES TESTIFIED IN A "LEANING" AND "COLORED" MANNER AND NOT FREELY AND TRULY BECAUSE OF THAT THREAT OF

A HEAVIER SENTENCE THAT HANG HEAVY OVER THEIR HEADS . . . . .

Government witnesses, Mrs. Sue Cook, and Mrs. Shirley Bowman, and prospective witness French O. Whitten, Jr., were under indictment in this case — except that Sue Cook was under the threat or prospect of indictment in this case — and that the testimony of Sue Cook and Shirley Bowman — and the plea of guilty by F. O. Whitten, Jr., was "colored" and not truly given — for that they were constantly held in threat of greater punishment by the court if they did not testify against your Petitioner in this case. And, because of that continuing threat and/or intimidation — they testified in a "leaning" and "colored" manner. and not freely and truly because of that threat that ever hang heavy over their heads.

Your Petitioner avers that the trial Court accepted the said pleas by the said co-defendants — but waited for final imposition of sentence and judgment of the aforesaid pleas until after the jury trial of the Petitioner was terminated and a guilty verdict was returned.

Your Petitioner avers that it was a harmful and serious and damaging error causing your Petitioner's conviction — for the trial Court to accept the aforesaid guilty plea — and the plea of nolo contendre from the aforesaid co-defendants and keep the final disposition of judgment hanging over the heads of the said co-defendants until they testified against your Petitioner in favor of the U. S. Government. Shirley Bowman did testify. French O. Whitten, Jr., did not testify — but the threat at all times hang heavy over his head. Sue Cook did testify. She was a former secretary to John Ike Griffith, and had access to all confidential information that the other secretary had — and the threat of her indictment and prosecution for the same offense was hanging over her head at the time she did give her testimony for the government.

Your Petitioner avers that this Honorable Court, and all U. S. Courts, as well as all State courts are aware of the facts that a plea of nolo contendre — and a plea of guilty — is an admission of the facts charged by the indictment — and is in fact a plea of guilty. And, therefore, no U. S.

Judge has the power or discretion to find a defendant "Not guilty" on a plea of nolo contendre. And, the plea of guilty by French O. Whitten, Jr., made it impossible for your Petitioner to obtain a fair trial WITHOUT A SEPARATION OF THE CAUSE — AND SEPARATE TRIAL FOR JOHN IKE GRIFFITH. And, it was impossible for John Ike Griffith to obtain a fair and impartial trial with the said witnesses — co-defendants.

Your Petitioner avers that the U. S. Trial Court committed convicting error by forcing the herein named co-defendants to testify against him while they were under the constant threat and fear that if they did not so testify favorably to the prosecution that they may receive a maximum prison sentence of fifteen years and up to a $20,000.00 or more in fines. Sue Cook did testify under the said duress. Shirley Bowman did testify under the duress as aforesaid. French O. Whitten, Jr., did not testify — but was held ever under the threat as well. And, the fact that Judge French O. Whitten, Jr., had pleaded guilty in the case to the charges and that fact fully reiterated to each juror separately while attempting to qualify the jury — made the situation impossible for the defendant, John Ike Griffith, to overcome such bias and prejudice with the jury that the defendant John Ike Griffith did not get a fair trial. And, said error was highly prejudicial and harmful error that prevented the defendant John Ike Griffith from having a fair trial — and due process of law.

Your Petitioner avers that the trial court being aware of the facts herin above stated, committed serious, harmful, and hurtful convicting error by failure to properly instruct the jury to be cautious as to the testimony given by the aforesaid Sue Cook, Shirley Bowman, and French O. Whitten, Jr., due to the herein above stated facts. Se: **U. S.** vs. **Maiso** (2nd Cir.) 275 F. 2nd 129; **Joseph** vs. **U. S.** (5th Circuit) 286 F. 2nd 468; **Lee** vs. **U. S.**, 343 U. S. 747, 757, 758; **Bailey** vs. **Buskirk** (9th Cir.) 345 F 2nd 298; **Oreba** vs. **U. S.** (9th Cir.) 293 F. 2nd 747 . . .

ISSUE NO. 8. STATEMENT OF FACT, ARGUMENT, CITATION OF LAW

THAT THE EVIDENCE INTRODUCED IN THIS CASE SHOWS THAT THE USE OF THE MAILS WAS PURELY INCIDENTIAL TO, AND A REMOTE AFTER-THE-FACT THING WITH THE GENERAL OPERATION OUT OF WHICH GREW THE MAIL FRAUD CHARGES AGAINST YOUR PETITIONER, WHEREIN HE WAS CHARGED WITH CONSPIRACY TO USE THE MAILS TO DEFRAUD, AND THUS THE JUDGMENT WAS ERRONEOUS AND VOID AGAINST YOUR PETITIONER.

Your Petitioner performed the office work as an attorney at law in preparing and processing divorce cases wherein all of the personal and oral conversations were held with each client in the office in the interviews, the formation of legal documents, the taking of the testimony of the complainants in divorce cases before commissioners and attorney, where the signing of the legal documents took place in person, in the office of the Petitioner, at the time and place — and where all of the work incidental to the divorce proceedings took place.

There in the office of your Petitioner is where the attorney fees in connection therewith were FULLY PAID OVER THE DESK, — AND NOT BY U. S. MAILS.

And, after then — as an after-the-fact matter of a thing the final decree of divorce was mailed to the parties complainant and respondent to the said divorce proceedings. And, all of the acts performed by the Petitioner for and in behalf of the parties to the divorce action were LEGAL ACTS, NORMAL ACTS THAT TAKE PLACE IN THOSANDS OF LAW OFFICES DAILY ALL OVER THE COUNTRY — and with NO INTENT TO CONSPIRE in any way to defraud said clients. And, NOT A SINGLE ONE OF THE SAID DIVORCE FINAL DECREES HAVE BEEN SET ASIDE OR VOIDED BY ANY COURT. And,three years time has elapsed and is a bar by the statute of limitations to the setting aside of any collateral attack on any one of these said divorce decrees for the purpose of avoiding the same. Thus since the divorce decrees have stood the test of this three year's period of time as a good and legal

divorce — prepared and worked by the Petitioner performing perfectly legal acts in his normal course of his operation as an attorney-at-law — NO CONSPIRACY TO USE THE MAILS TO DEFRAUD COULD POSSIBLY STAND JUSTLY AGAINST YOUR PETITIONER: Citing: **U. S. vs. Thomas E.. Maze,** Case No. 72-1007 (Sixth Circuit Court of Appeals decided and filed Oct. 4, 1972.

"EXHIBIT A" DECISIONS UPHOLDING THE LEGALITY OF THE ALABAMA DIVORCES as obtained pursuant to Title 34, Sections 27 and 29, Alabama Code. COMMONWEALTH vs. CASE, 200 Pennsylvania Superior Court 200; 189 Atlantic Reporter, Second Series 756 decided March 19, 1963. FACTS: Helene Case prosecuted Russell Case for non-support. The defendant contended that he ~~as~~ was not her legal husband due to the fact the parties were both divorced in Alabama after staying in Montgomery Motel for about two days. They then remarried in Penna. Neither had lived in Alabama before and they did not give up their jobs or business to come to Alabama from New Jersey where they lived at that time. Defendant contended the divorces were invalid due to the lack of residence.

HOLDING: 1. Even though it is clear that neither party was ever a good-faith resident of Alabama the full faith and credit clause bars the defendant from attacking the decree on jurisdictional grounds in the courts of a sister state where both parties submitted to the jurisdiction of the courts of the rendering state and the decree is not subject to attack in the courts of that state. **Sherrer** v. **Sherrer,** 334 U. S. 343; 68 S. Ct. 1087; 92 L. Ed. 1429 (1948) **Coe** v. **Coe;** 334 U. S. 378; 68 S. St. 1094; 92 L. Ed. 1451, 1452.

2. In Alabama a spouse may not attack a collusive decree of divorce where he participated in the collusion. Wright vs. Wright, 230 Ala., 35, 159 So. 220 (1935). **Levine** vs. **Levine,** 262 Ala. 491, 80 Sou. 2nd 235 (1955).

3. One in privity with, or has knowledge of or instigates a fraud on a court in order to obtain a divorce is estopped to question its validity at a later date. He therefore could not attack wife's divorce. **Fairclough** vs. **St. Amand,** 217 Ala. 19; 114 So. 472.

4. The court cannot set aside the decree ex mero motu on authority of **Hartigan** vs. **Hartigan,** 272 Ala. 67; 128 So. 2nd 725 for in that case both parties were before the court and NEITHER OBJECTED TO THE SETTING ASIDE OF THE DECREE. The **Hartigan** case was distinguished in the case of **Aiello** vs. **Aiello,** 272 Ala. 505, 133 Sou. 2nd 18 (1961) in which case ONE OF THE PARTIES OBJECTED and the court held the decree could not be set aside.

5. Remarriage of the parties within sixty days as prohibited by Alabama decree did not invalidate the marriage, **Marzano** v. **Marzano,** 154 N. Y. S. 2nd 507 (1956). The law of the state where the marriage is contracted determines its validity and the 60 day Alabama prohibition is not an interlocutory period after which the divorce becomes final, but is merely a restriction on remarrying.

Therefore, the decrees would not be subject to attack in Alabama and since both parties entered a general appearance in the Alabama proceedings the Pennsylvania Court must uphold them under the FULL FAITH AND CREDIT CLAUSE OF THE U. S. CONSTITUTION. And, since none of the cases handled by your Petitioner Griffith have been attacked or voided by any competent court to determine their legality, — Petitioner can not be legally prosecuted for mailing one or more of the decrees through the U. S. Mails as an after-the-fact-act.

ISSUE NO. 9. STATEMENT OF FACT, ARGUMENT, CITATIONS OF LAW

We submit that the indictment in this case becomes a part of the transcript and the court files and record. And, that since each of the counts of the indictment state "COUNT FIVE. (18 USC 1341) THE GRAND JURY CHARGES:

"1. Prior to the 21st day of August, 1965, and continuing to the day of the return of this indictment, the defendants John Ike Griffith and Shirley Bowman devised and intended to devise a scheme and artifice to defraud in this:" Now this statement was in Counts two, three, four, and five, and six acknowledging that the acts occurred

more than five years before the return of the indictment. And, Count one states on its face that full five years time had expired before the return of the indictment. We submit that this is a factual admission on the face of the pleadings and the court record in this case that there does exist PRE-INDICTMENT DELAY. Petitioner insists that the Pre-Indictment delay did prejudice the ability of the defendant to defend himself — as the act complained of was known to the government more than five years — without any attempt to indict your defendant.

STATE OF ALABAMA, JACKSON COUNTY)

John Ike Griffith, being first duly sworn under oath, presents that he has subscribed to the above, and does state that the information, facts, and allegations hereinabove stated are true and correct to the best of his knowledge and belief.

John Ike Griffith

John Ike Griffith

Sworn to and subscribed this the 21st day of July, 1975.

Anna A. Devere

Notary Public

CONCLUSION

For the reasons above stated, it is respectfully submitted that the petition for writ of certiorari in this case should be granted.

John Ike Griffith

JOHN IKE GRIFFITH, pro se

APPENDIX will be filed in compliance with rule 36 of the Rules of the Supreme Court of the United States..

CERTIFICATE OF SERVICE

I certify that I have this the ~~21~~ 22 day of July, 1975, served three copies of the foregoing Petition for Writ of Certiorari on the Attorney General Of the U.S., Justice Department Washington, D. C. by depositing the copies of the same in the U.S. Mails, properly addressed to him, with postage prepaid.

John Ike Griffith

John Ike Griffith

Supreme Court, U. S.
FILED
AUG 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

DOCKET NO.: **75-175**

JOHN IKE GRIFFITH

Petitioner-Appellant

vs.

UNITED STATES OF AMERICA,

Respondent-Appellee

APPENDIX

John Ike Griffith, pro se

Address:

Box 147, Route 1,
Dutton, Alabama 35744.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
* * * * * * * * * *

UNITED STATES OF AMERICA

VS. NO. CR 70 282

JOHN IKE GRIFFITH
FRENCH O. WHITTEN, JR.
ANN LOVE
SHIRLEY BOWMAN

INDICTMENT

COUNT ONE: (18 USC 371) Charged conspiracy to use the mails to defraud, and set out facts at great length.....too extensive to set out in full here....

Excerpts from COUNT ONE, paragraph 3 is quoted as follows:

". 3. Prior to the 21st day of August, 1965, and continuing to the day of the return of this indictment the defendants named hereinabove devised and intended to devise a scheme and artiface to defraud . . . . .etc."

Excerpts from COUNT TWO: 18USC 1341, paragraph one is quoted as follows:

Quote: " 1. Prior to the 21st day of August, 1965, and continuing to the day of the return of this indictment, the defendant, John Ike Griffith and Shirley Bowman devised and intended to devise a scheme and artifice to defraud in this: - - - - - - - "

BEST COPY AVAILABLE

A1.

Excerpts from COUNT THREE: (18 USC 1341) paragraph one is quoted as follows:

Quote: "1. Prior to the 21st day of Aug., 1965, and continuing to the day of the return of this indictment the defendants John Ike Griffith and Shirley Bowman devised and intended to devise a scheme and artifice to defraud in this. . . . ."

Excerpts from COUNT FOUR : (18 USC 1341) paragraph one is quoted as follows:

Quote: "1. Prior to the 21st day of August, 1965, and continuing to the day of the return of this indictment, the defendants, John Ike Griffith and Shirley Bowman, devised and intended to devise a scheme and artifice to defraud in this: . . . . . ." end quote.

Excerpts from COUNT FIVE: (18 USC 1341) paragraph one is quoted as follows:

Quote: " Prior to the 21st day of Aug., 1965, and continuing .....etc."end quote.

Excerpts from COUNT SIX: (18 USC 1341) paragraph one is quoted as follows:

Quote: "1. Prior to the 21st day of August, 1965, and continuing to the day of the return of this indictment ....." end quote.

APPENDIX A2

REPORT OF MAGISTRATE

COURT ORDERS APPEALED FROM

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA __--Sou. Div.

JOHN IKE GRIFFITH

No. CA 74-A-635-S

VS.

UNITED STATES OF AMERICA

EXAMINATION,REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT

Movant was convicted in this Court on April 16, 1971, on one count of violation of Title 18, U.S.C. # 371, conspiracy to use the United States mails to defraud and on five specific counts of violation of Title 18,U. S. C. # 1341, use of the United States mails to defraud. He was subsequently sentenced to imprisonment for a period of five years and fined $10.000 under Count One of the indictment and was sentenced to five years imprisonment under each of Counts Two and Three, said sentence to run concurrently with the sentence under Count one; three years probation under each of Counts Four, Five and Six. such three year periods of probation to be served concurrently and to begin upon his release from custody. He was also taxed with the cost in the case

amounting to some $5,226.16. In due course, his appeal was perfected to the United States Court of Appeals for the Fifth Circuit which affirmed on January 20, 1972. U. S. vs. Griffith, 453 F. 2nd 1207, 5th Cir. (1972), Cert. Den. 92 S. Ct. 2059, 406 U. S. 957. On June 26 1974, he filed his motion in this Court pursuant to Title 28, U.S.C. # 2255 and included therewith a forty-two page document which he has entitled

"Memorandum of Law in Support of: Motion to Vacate Sentence. Grant a New Trial or Discharge Petitioner from Custody Pursuant to Section 2255, Title 28, U. S. C." Upon careful study , it is found that this additional document contains certain allegations which Movant apparently wishes the Court to consider in support of his motion. Contemporaneously with the above, he has filed three motions, the thrust of which appear to be that any United States district judge to whom his motion might be assigned and who is also a present or past member of the Birmingham Bar Association or the Alabama bar Association, should disqualify himself from these proceedings on the ground that as a member, past or present, of either the Birmingham or the Alabama Bar Associations, he has such a personal interest in the outcome of these proceedings as to make it unfair to the Movant for such Judge to sit. The Magistrate will consider all the above motions and the memorandum as one integrated request for post-conviction relief and will treat them as such herein.

Movant asserts that he has previously filed a motion under Section 2255 in United States District Court for the Northern District of Texas. which said motion was denied. The Magistrate is uninformed of the grounds alleged in the previous motion. However, since the statute requires that such a motion be filed in the court which imposed the sentence . the Magistrate will consider

that the motion was dismissed there as having been brought in the wrong district and not on the merits.

On June 28, 1974, Magistrate R. Macey Taylor, entered an order requiring the respondent to show cause why the relief requested by the Movant should not be granted. The Respondent has filed its answer and Movant has since filed a traverse, Such response and traverse will be considered herein.

(Then he takes five pages to discuss the issues and ends by recommending that the relief requested by the Movant should be denied.)

DATED, this 7th day of November, 1974.

Edwin L. Nelson

EDWIN L. NELSON-U. S. MAGISTRATE

- - - - - - - - - - -

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

JOHN IKE GRIFFITH

VS. No. CA 74-A-635-S

UNITED STATES OF AMERICA

ORDER

The Court has considered the motion by John Ike Griffith pursuant to28 U.S.C. # 2255 and the report and recommendation of the United States Magistrate. The Magistrate's recommendation is hereby ADOPTED and APPROVED.

It is therefore ORDERED that the motion of John Ike Griffith to vacate and set aside the conviction in criminal action 70-282-S be and the same hereby is DENIED.

The Clerk is directed to furnish Movant, in care of Box 147, Route 1, Dutton, Alabama and the United States Attorney, Northern District of Alabama with a copy of the Magistrate's report and recommendations and this order.

DONE, this 7th day of November, 1974.

C. W. ALLGOOD

UNITED STATES DISTRICT JUDGE

Filed in Clerk's
Office,
Northern District of Ala.
Nov. 8, 1974

William E. Davis
Clerk, U. S. District Court

IN THE UNITED STATES COURT OF APPEALS FOR

THE FIFTH CIRCUIT

No. 74-4012

DO NOT PUBLISH

Appeal from the United States District Court = - Northern District of Alabama

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March 25, 1975

Before BELL, WISDOM AND CLARK, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21 1/ 2/

APPLICATION FOR REHEARING WAS DENIED ON JUNE 3, 1975.

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* Rule 18, 5 Cir.; See Isabell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F. 2nd 409.

1/ See N. L. R. B v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F. 2nd 906.

2/ The petitioner cited as error: (1) Ineffective assistance of counsel; (2) Prejudicial pre-indictment delay; (3) Introduction of evidence obtained by illegal search; (4) Disparity in sentencing of co-

defendants; (5) Introduction of "colored" testimony by witnesses under threat of indictment or more severe punishment; (6) Illegal surveillance; (7) Use of mails only incidental to alleged scheme to defraud; (8) Improper denial of motions to recuse judges on grounds of their membership in the Birmingham and Alabama Bar Associations.

- -

MOTIONS BY PETITIONER WHICH IS BELIEVED TO BE ERRONEOUSLY OVERRULED BY THE U. S. DISTRICT COURT, AND AFFIRMED BY FIFTH CIRCUIT COURT OF APPEALS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JOHN IKE GRIFFITH

VS. No. CA 74-A-635-S

UNITED STATES OF AMERICA

MOTION REQUESTING ORAL EVIDENTIARY HEARING ON PETITIONER S SECTION 2255 MOTION, AND ON MOTION REQUESTING BIRMINGHAM and/or ALABAMA U. S. DISTRICT JUDGES TO RECUSE THEMSELVES

Comes now your Petitioner in the above styled cause, John Ike Griffith, and respectfully moves this Honorable Court to enter an order or decree setting down for oral hearing the Motions filed by Petitioner under Section 2255 of the U. S. Code; and the Motion Requesting U. S. District Judges who are members of the Birmingham and/or Alabama Bar Associations to recuse them-

selves from sitting on, or ruling on, or passing judgment on the merits of the law and/or facts in the above styled cause, and as grounds for this Motion Requesting Oral Evidentiary Hearing sets down and assigns the following separate and several grounds separately and severally:

1. That your Petitioner desires to give oral testimony in support of the matters and things set forth in the pleadings of his Section 2255 Motion which he believes is pertinent and relative to the ends of justice in the premises.

2. The Petitioner desires to summons witnesses other than himself to prove the allegations stated in the above mentioned motions.

3. That the ends of justice will require an oral evidentiary hearing on the merits.

John Ike Griffith

John Ike Griffith, pro se
Box 147, Route 1,
Dutton, Alabama 35744.

* * * * * * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JOHN IKE GRIFFITH,

VS. No. CA 74-A-635-S

UNITED STATES OF AMERICA

MOTION REQUESTING THE HONORABLE CLARENCE W. ALLGOOD, UNITED STATES DISTRICT JUDGE TO RECUSE HIMSELF FROM HEARING PETITIONER'S SECTION 2255 MOTION

Comes now the Petitioner in the above styled cause, John Ike Griffith, and moves this Honorable Court to enter an order or decree removing the Honorable Clarence W. Allgood, U. S. District Judge from hearing the Section 2255 Motion of the Petitioner, and as grounds for this motion sets down and assigns the following separate and several grounds separately and severally:

1. That Clarence W. Allgood, the Honorable U. S. District Judge presided at the trial of your Petitioner in case number CR-70-282-S, the United States of America vs. John Ike Griffith, and it became evident from the transcript of the testimony that that case was a Birmingham and Alabama Bar Association prosecution, and Petitioner verily believes that the Honorable Clarence W. Allgood is a member of the Alabama and Birmingham Bar Associations and did have such interest in the outcome of the case to secure a conviction of your Petitioner that he is disqualified to hear Petitioner's Section 2255 Motion on account of his biase and prejudice.

2. That the Honorable Clarence W. Allgood clearly indicated his biase and prejudice in the case by remarking in open court at

the time Petitioner was sentenced in case number CR-70-282-S to the effect: "I read a letter last night" indicating that he based his decision to give the defendant Petitioner the maximum sentence based on his prejudice and biase in a letter after the trial had closed, and not on the evidence produced before the jury, and reported in the transcript of evidence.

3. That it appears to be necessary to subpoenia the Honorable Clarence W. Allgood as a witness in an evidentiary oral hearing on Petitioner's Section 2255 motion to have him testify further relative to the "letter which he read last night" on the night before he sentenced your Petitioner in case No. CR-70-282-S United States of America vs. John Ike Griffith, and which said letter he read after the case was closed the day before--and which letter obviously was read outside of the court room or the court proceedings in the case--and which obviously prejudiced and biased the Judge. And, it would appear to be improper for the Honorable Clarence W. Allgood to appear in the Section 2255 Motion oral hearing both as a judge and as a witness at the same time.

John Ike Griffith

John Ike Griffith, pro se
Box 147, Route 1,
Dutton, Alabama 35744.

State of Alabama, Jackson County)

Before me the undersigned authority in and for said county, in said state, personally appeared John Ike Griffith, and by me first duly sworn, he subscribed to the above, and does state that the information, facts, and allegations herein above stated are true and correct to the best of his knowledge and belief.

John Ike Griffith

Sworn to and subscribed this the __day of ____, 19___.

SEAL ____ Notary Public.

Signature of Notary on original copy.

* * * * * * * * * *

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA

John Ike Griffith

vs. No. CA 74 A 635

United States of America

MOTION REQUESTING BIRMINGHAM AND ALABAMA U. S. DISTRICT JUDGES TO RECUSE THEMSELVES

Comes now the Petitioner in the above styled cause, John Ike Griffith, and respectfully moves this Honorable court to enter an order or decree removing and disqualifying all United States Judges who are at the present time, and whom have been members of the Birmingham and/or Alabama

Bar Associations from sitting on, or ruling on, or passing judgment on the merits of law and fact in the above styled cause, and as grounds for this motion sets down and assigns the following separate and several grounds separately and severally:

1. The transcript of the evidence presented at the trial in case no. CR-70-282-S entitled United States vs. John Ike Griffith , along with sworn affidavits of the members of the Alabama and Birmingham Bar Associations in their application for search warrant of your Petitioner's office shows conclusively that the proceedings in case number CR-70-282-S was a bar association prosecution instituted by and prosecuted by the Birmingham and Alabama Bar Associations, and that the said judges being members of the said Alabama Bar Association, and the Birmingham Bar Association would be prejudiced and biased and disqualified by virtue of their said membership to hear fairly and impartially the merits of your Petitioner's Section 2255 Motion for a redetermination of the merits of the case in case No. CR-70-282-S, U. S. of America vs. John Ike Griffith.

John Ike Griffith

Address of the Petitioner: John Ike Griffith, pro se
Box 147, Route 1,
Dutton, Alabama 35744.

CONSTITUTION, STATUTES AND RULES INVOLVED

I

Constitution of the United States
AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon reasonable cause, supported by oath or affirmation, and particularly describedg the place to be searched, and the person or things to be seized.

Constitution of the United States
Amendments ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, WITHOUT DUE PROCESS OF LAW; nor shall private property be taken for public use, without just compensation.

Constitution of the United States
Amendments ARTICLE VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Constitution of the United States
Amendments ARTICLE XIV

Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, WITHOUT DUE PROCESS OF LAW: nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, Section 1257 (3), United States Code

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or

where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

5. Title 34,Section 27, Code of Alabama, 1940

For abandonment, twelve months' residence to be proved.

No bill can be filed for a divorce on the ground of voluntary abandonment, unless the party applying therefor, whether husband or wife, has been a bona fide resident citizen of this state for twelve months next preceding the filing of the bill which must be alleged in the bill and proved **PROVIDED HOWEVER, THE PROVISIONS OF THIS SECTION SHALL NOT BE OF FORCE AND EFFECT WHEN THE COURT HAS JURISDICTION OF BOTH PARTIES TO THE CAUSE OF ACTION.**

6. Title 34, Section 29, Code of Ala.,1940

If defendant a non resident, a year's residence by plaintiff must be proved.

When the defendant is a nonresident, the other party to the marriage must have been a bona fide resident of this state for one year next before the filing of the bill which must be alleged in the bill and proved; **PROVIDED HOWEVER, THE PROVISIONS OF THIS SECTION SHALL NOT BE OF FORCE AND EFFECT WHEN THE COURT HAS JURISDICTION OF BOTH PARTIES TO THE CAUSE OF ACTION.**

CERTIFICATE OF SERVICE

I certify that I have this the 18 day of August, 1975, served three copies of the foregoing APPENDIX to Petition for Certiorari on the Solicitor General of the United States, Justice Department, Washington, D. C. by depositing the copies of the same in the U. S. Mails, properly addressed to him, with the postage prepaid.

John Ike Griffith

John Ike Griffith

Supreme Court, U. S.
FILED
AUG 9 1975
MICHAEL RODAK, JR., CLERK

No. 75-175

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN IKE GRIFFITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-175

JOHN IKE GRIFFITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the district court erred in denying his application for relief under 28 U.S.C. 2255 and in not granting him an evidentiary hearing on his application.

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of one count of conspiracy to use the United States mails to defraud, in violation of 18 U.S.C. 371, and five counts of mail fraud, in violation of 18 U.S.C. 1341.[1] He was sentenced to concurrent

[1] Petitioner had been a practicing attorney in Alabama. "The convictions were based on substantial evidence that [petitioner], with others, fraudulently and through the use of the mails pro-

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terms of five years' imprisonment on the first three counts of the indictment and concurrent terms of three years' probation on the other three counts, the period of probation to begin upon his release from custody; he was also fined $10,000. The court of appeals affirmed. *United States* v. *Griffith,* 453 F. 2d 1207 (C.A. 5), certiorari denied, 406 U.S. 957.

Petitioner then filed a motion to have his sentence vacated pursuant to 28 U.S.C. 2255. Initially, a United States Magistrate considered the matter and filed a report and recommendation, recommending to the district court that the relief requested should be denied.[2] The district court adopted and approved the report and recommendation of the Magistrate and denied relief without an evidentiary hearing (Pet. App. A5). The court of appeals affirmed (Pet. App. A6–A7).

1. Petitioner contends (Pet. 8–9) that there was an intentional delay by the government in returning the indictment, which was not filed until several years after the government first obtained knowledge of the fraud.

The indictment was returned by the grand jury on August 20, 1970. The conspiracy count charged a series of continuing violations from August 1965 to within eight days prior to the return of the indictment. The five substantive counts all related to offenses com-

cured illegal divorces in Alabama for non-residents." *United States* v. *Griffith*, 453 F. 2d 1207, 1208 (C.A. 5), certiorari denied, 406 U.S. 957. Co-defendant French O. Whitten, Jr., pleaded guilty prior to trial, while co-defendants Ann Love and Shirley Bowman entered pleas of *nolo contendere.*

[2] The report and recommendation of the United States Magistrate is included as an appendix to this memorandum.

mitted in 1969 or 1970 (App., *infra,* pp. 15–16). Moreover, all the acts charged were alleged to have occurred well within the applicable statute of limitations, 18 U.S.C. 3282. Petitioner has not shown any intentional delay by the government to gain a tactical advantage, nor has he demonstrated actual prejudice in the conduct of his defense caused by the delay. His contention is therefore without merit. See *United States* v. *Marion,* 404 U.S. 307, 323–326.

2. Petitioner argues (Pet. 18–19) that he received a harsher punishment than did his co-defendants because he chose to go to trial rather than enter a guilty plea.

The sentence imposed by a district court is generally not reviewable if it is within the statutory limits. *Gore* v. *United States,* 357 U.S. 386. Here, the sentence imposed, five years' imprisonment, three years' probation, and a $10,000 fine was well within the statutory limits provided by law. The record contains no indication that the trial judge considered impermissible factors in imposing this concededly lawful sentence. Nor is there any support in the record for petitioner's speculative contention that the trial judge increased petitioner's punishments because he did not enter a plea of guilty as did his co-defendants. In the absence of an articulated expression by the trial court that it considered impermissible factors in arriving at its disparate sentences between co-defendants, appellate review is unavailable. See *United States* v. *Tucker,* 404 U.S. 443, 446–447; *Williams* v. *Illinois,* 399 U.S. 235, 243; *United States* v. *Bristol,* 473 F. 2d 439, 445 (C.A. 5).

3. Petitioner alleges (Pet. 21–23) that the testimony of government witnesses Sue Cook and Shirley Bowman, both former secretaries in petitioner's office, was "colored" because they were under indictment or threat of indictment.

As the district court concluded, however, the fact that two witnesses who testified were threatened with or were under indictment is a matter that goes only to the weight of their testimony (App., *infra,* p. 17). The record reflects that both witnesses were available for cross-examination and impeachment, and Bowman was extensively examined by counsel for petitioner as to her status as a defendant.[3] In any event, as the court of appeals originally found, the testimony of at least thirteen other witnesses provided overwhelming evidence of petitioner's guilt. *United States* v. *Griffith, supra,* 453 F. 2d at 1208.

4. Petitioner claims (Pet. 19–20) that evidence was admitted at trial that was obtained through illegal electronic surveillance. However, he offers no facts or circumstances to support this allegation, nor does he specify what trial evidence was obtained illegally. Moreover, petitioner filed a motion before trial requesting the right to inspect notes, logs and transcriptions of any electronic or mail surveillance conducted by the government. The trial court denied petitioner's motion, and petitioner chose not to raise the issue on direct appeal (App., *infra,* pp. 17–18).

[3] Petitioner also contends (Pet. 22–23) that Bowman and Cook may have testified falsely, but he presents no factual support for this allegation.

Therefore the contention may not be made now. See *Kaufman* v. *United States,* 394 U.S. 217, 223 and n. 7.

5. Relying on *United States* v. *Maze,* 414 U.S. 395, petitioner contends (Pet. 24–26) that his use of the mails in obtaining Alabama divorces for non-residents was incidental to such activities and thus did not constitute a violation of federal law.

Petitioner did not raise this issue on direct appeal. Moreover, the precise issue was decided by the Fifth Circuit in *United States* v. *Edwards,* 458 F.2d 875, 882–883, certiorari denied *sub nom. Huie* v. *United States,* 409 U.S. 891, a case so identical to petitioner's that the district court found it dispositive here (App., *infra,* p. 18). In *Edwards,* as here, the defendants claimed that there was no solicitation by mail; that the fraud occurred during the meetings in their offices; and only after the fraud was accomplished were the mails used incidentally to send the purported divorce decrees. In holding that such a mailing was in furtherance of the scheme and not merely incidental thereto, the court said (458 F.2d at 883):

> [S]ending the purported divorce decree was a final step in the scheme to defraud, necessary to avoid detection and to prevent the recovery of money lost by the victims and was thus a material part of the fraudulent scheme.

This case is wholly unlike *United States* v. *Maze, supra,* in which this Court held that 18 U.S.C. 1341 did not proscribe a credit card scheme in which the accused used a stolen credit card and his fraud consisted solely of obtaining goods and services by misrepresent-

ing himself as the legitimate holder of the card. The defendant in *Maze* did not use the mails himself, nor did their use by others, though predictable, in any way further the execution of his fraudulent scheme. The only use of the mails was by the establishments that accepted the credit card in payment for services when, in order to receive payment, they mailed sales slips to the company which had issued the credit card. The Court held that such subsequent mailings were not "for the purpose of executing [the] scheme or artifice" (18 U.S.C. 1341) and therefore were not "sufficiently closely related to respondent's scheme to bring his conduct within the statute" (414 U.S. at 399).

Here, in contrast to *Maze,* transmission of the divorce decrees through the mails was an integral part of the scheme; for without the use of the mails to defraud, petitioner's scheme could not have been realized.

6. Petitioner urges that the district court erred in denying his motion to have United States District Judge Clarence W. Allgood disqualify himself from hearing petitioner's Section 2255 motion for personal bias.[4]

The affidavit accompanying petitioner's recusal motion simply alleges that Judge Allgood is a member

[4] Petitioner also filed two other motions which appear to raise the same bias claim against any United States district judge to whom his petition might be assigned and who is also a present or past member of the Birmingham or Alabama Bar Associations. The district court did not consider these because they were not verified by affidavit, as required by 28 U.S.C. 144 (App., *infra*, p. 12).

of the Birmingham and Alabama Bar Associations, which, petitioner says, were the primary moving forces behind his prosecution and conviction (Pet. App. A9–A10). Petitioner has neither alleged nor shown any specific acts or circumstances to demonstrate that Judge Allgood had any personal interest in the outcome of the case or personal enmity toward petitioner. While membership in an organization such as a bar association might give rise to a personal interest in furthering the goals of that organization, membership alone is not sufficient to show bias. Petitioner has failed to demonstrate the kind of "personal bias or prejudice either against him or in favor of any adverse party" required by the statute. See 28 U.S.C. 144.

7. Since petitioner's contentions are conclusively refuted by the record and files of the case, the district court properly [5] refused to grant a hearing. *Sanders* v. *United States,* 373 U.S. 1.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

[5] Petitioner contends that he was denied the effective assistance of counsel because the trial court denied a continuance motion when one of his attorneys became ill and was unable to attend the trial for two and one-half days (Pet. 11–12). He also alleges that the trial court erred by denying his motion to suppress evidence seized under an allegedly defective search warrant (Pet. 14–17). Both contentions were considered by the court of appeals on petitioner's direct appeal and found to have no merit whatsoever. *United States* v. *Griffith, supra,* 453 F. 2d at 1208.

APPENDIX

United States District Court for the Northern District of Alabama, Southern Division

No. CA 74-A-636-S

JOHN IKE GRIFFITH

v.

UNITED STATES OF AMERICA

ORDER

The Court has considered the motion filed by John Ike Griffith pursuant to 28 U.S.C. § 2255 and the report and recommendation of the United States Magistrate. The Magistrate's recommendation is hereby ADOPTED and APPROVED.

It is therefore ORDERED that the motion of John Ike Griffith to vacate and set aside the conviction in criminal action 70-282-S be and the same hereby is DENIED.

The Clerk is directed to furnish Movant, in care of Box 147, Route 1, Dutton, Alabama and the United States Attorney, Northern District of Alabama with a copy of the Magistrate's report and recommendation and this Order.

DONE, this 7th day of November, 1974.

_____,

U.S. District Judge.

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United States District Court for the Northern District of Alabama, Southern Division

No. CA 74–A–635–S

JOHN IKE GRIFFITH

v.

UNITED STATES OF AMERICA

EXAMINATION, REPORT AND RECOMMENDATION TO THE UNITED STATES DISTRICT COURT

Movant was convicted in this Court on April 16, 1971 on one count of violation of Title 18, U.S.C. § 371, conspiracy to use the United States mails to defraud and on five specific counts of violation of Title 18, U.S.C. § 1341, use of the United States mails to defraud. He was subsequently sentenced to imprisonment for a period of five years and fined $10,000 under Count One of the indictment and was sentenced to five years imprisonment under each of Counts Two and Three, said sentences to run concurrently with the sentence under Count One; three years probation under each of Counts Four, Five and Six, such three year periods of probation to be served concurrently and to begin upon his release from custody. He was also taxed with the cost in the case amounting to some $5,226.16. In due course, his appeal was perfected to the United States Court of Appeals for the Fifth Circuit which affirmed on January 20, 1972. *U.S.* vs. *Griffith,* 453 F. 2d 1207, 5th Cir. (1972), Cert. den. 92 S. Ct. 2059, 406 U.S. 957. On June 26, 1974, he filed his motion in this Court pursuant to Title 28, U.S.C. § 2255 and included therewith a forty-two page document which he has entitled "Memorandum of Law in Support of: Motion to Vacate Sentence. Grant a New Trial or Discharge Petitioner From Custody Pursuant to Section 2255, Title 28, U.S.C." Upon careful scrutiny, it is found that this additional document contains certain allegations which Movant apparently wishes the Court to consider in support of his motion. Contemporaneously with the above, he has filed three motions, the thrust of which appear to be that any United States district judge to whom his motion might be assigned and who is also a present or past member of the Birmingham Bar Association or the Alabama Bar Association, should disqualify himself from these proceedings on the ground that as a member, past or present, of either the Birmingham or the Alabama Bar Associations, he has such a personal interest in the outcome of these proceedings as to make it unfair to the Movant for such judge to sit. The Magistrate will consider all the above motions and the memorandum as one integrated request for post-conviction relief and will treat them as such herein.

Movant asserts that he has previously filed a motion under Section 2255 in the United States District Court for the Northern District of Texas, which said motion was denied. The Magistrate is uninformed of the grounds alleged in the previous motion. However, since the statute requires that such a motion be filed in the court which imposed the sentence, the Magistrate will consider that the motion was dismissed there as having been brought in the wrong district and not on the merits.

On June 28, 1974, Magistrate R. Macey Taylor, entered an Order requiring the Respondent to show cause why the relief requested by the Movant should not be granted. The Respondent has filed its answer and Movant has since filed a traverse. Such response and traverse will be considered herein.

The means by which a litigant may raise the issue of a judge's personal bias either against him or in favor of an opposing party is provided by statute, 28 United States Code § 144. In substance, the statute requires that a party believing that the judge sitting in his case is biased, must file an affidavit stating his belief and setting forth the facts and reasons which give rise to such belief and must be accompanied by a certificate of counsel of record to the effect that such affidavit is filed in good faith. The Movant herein has filed three separate motions, all of which in one form or another, attempt to raise the issue of judicial bias. Only one of such motions is verified by affidavit, and thus is the only one which will be treated here. This motion specifically requests that the Honorable Clarence W. Allgood, United States District Judge, disqualify himself for personal bias. It alleges that Judge Allgood is a member of the Birmingham Bar Association and of the Alabama Bar Association and that such Bar Associations were the primary moving forces which led to his prosecution and conviction. The affidavit is insufficient on its face in that it alleges nothing more than that Judge Allgood was a member of the stated Bar Associations. The Movant in no way attempts to show, other than by mere conclusion, that Judge Allgood has any personal interest in the out-

come of this proceeding. While membership in an organization, such as a Bar Association, might give rise to a personal interest of a judge in furthering the goals of that organization, membership alone is not sufficient to show such personal interest. Specific acts or circumstances must be shown which would give rise to such bias.

Were the Movant able to overcome the rather obvious deficiencies in his affidavit, his attempt to raise this issue is subject to an even more devasting defect. The statute clearly requires that the affidavit be accompanied by a certificate of the counsel of record for the party making the affidavit that such affidavit is filed in good faith. Since the Movant appears here pro se, he presumably could make the certificate himself but he has failed to do so and for that reason, if for no other, the Magistrate finds that the attempt of the Movant to raise the issue of judicial bias is insufficient and it should be denied.

Though Movant has failed to clearly delineate the issues which he wishes to have considered, a careful reading of his motion reveals several issues which the Magistrate will attempt to treat here. They are: (1) That he was denied effective assistance of counsel in that the trial court denied his motion for a continuance when one of his trial counsel became ill and was unable to attend the trial for a period of some two days. (2) That he was denied due process of law in that there was an inordinate delay in bringing the indictment against him, to his prejudice. (3) That the fruits of illegal searches and seizures were introduced against him in violation of his Fourth Amendment

rights to be free from unreasonable searches and seizures. (4) That his activities in obtaining Alabama divorces for non-residents of the State of Alabama were legal in that he obtained valid divorces for such non-residents and such divorces being valid, that no fraud was committed. (5) That he received a harsher punishment than did his codefendants for no reason other than that he chose to go to trial rather than to enter a plea of guilty. (6) That the testimony of two witnesses was "colored" because they, themselves, were in danger of prosecution for acts in furtherance of the scheme or conspiracy charged to this Movant. (7) That evidence was admitted against him which was obtained by illegal surveillance or illegal "bugging" or illegal electronic devices in violation of law and in violation of his Fourth Amendment right to be free from illegal searches and his Fifth Amendment right against self-incrimination. (8) That use of the mails in his activities in obtaining Alabama divorces for non-residents was incidental to such activities and thus did not constitute a violation of the law.

As to issues enumerated as (1) and (3) above, it need only be said that these issues were considered by the United States Court of Appeals for the Fifth Circuit and determined against the Movant. *U.S.* vs. *Griffith,* supra.

Movant complains that facts upon which the indictment, prosecution and conviction were based were known to prosecutors as early as 1965 and that such porsecutors purposefully delayed the indictment, to his prejudice. It is enough to say that if such allegations could be sustained, this ground was available to

Movant at the trial of his case and on appeal to the United States Court of Appeals for the Fifth Circuit. The record reveals that Movant, acting through counsel, filed a motion to dismiss the indictment on September 28, 1970 wherein, seventeen separate grounds were cited as a basis for dismissing such indictment but this ground was not among them. This issue was not raised on appeal. Section 2255 provides for a collateral attack on a judgment of conviction and is not a substitute for appeal for alleged errors committed at or before the trial. Belated suggestions of possible prejudice in such instances are not favored on collateral attack especially following a full review on appeal. *Eisner* vs. *U.S.,* 351 F. 2d 55, 6th Cir. (1965); *Houston* vs. *U.S.,* 419 F. 2d 30, 5th Cir. (1969).

The indictment upon which Movant was convicted was returned by the Grand Jury on August 20, 1970. Count One alleged a conspiracy in violation of 18 U.S.C. § 371 with numerous overt acts in furtherance of said conspiracy, one of which occurred on August 14, 1970, eight days prior to the indictment. Count Two of said indictment charged a violation on 3 December 1969, some eight and one-half months prior to the date of the indictment. Count Three charged a violation on March 18, 1970, some five months prior to the indictment. Count Four charged a violation on the 22nd day of January 1970, some eight months prior to the indictment. Count Five charged a violation on 3 July 1969, some fourteen months prior to the indictment. Count Six charged a violation on 18 July 1970, approximately one month prior to the indictment. All acts charged in the indictment, and

in each count thereof were alleged to have occurred on specific dates well within the applicable statute of limitations, 18 U.S.C. § 3282. Assuming there was a delay in bringing the indictment, a fact which is demonstrably false, such a delay does not amount to a violation of Movant's constitutional rights so long as the applicable statute of limitations period is followed and no prejudice is shown. *U.S.* vs. *Edwards,* 458 F. 2d 875, 5th Cir. (1972); *U.S.* vs. *Marion,* 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); *U.S.* vs. *Ewell,* 383 U.S. 116, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966); *U.S.* vs. *Judice,* 457 F. 2d 414, 5th Cir. (1972); *U.S.* vs. *Grayson,* 416 F. 2d 1073, 5th Cir. (1969); Cert. den., 396 U.S. 1059, 90 S. Ct. 754, 24 L. Ed. 2d 753 (1969); *Bruce* vs. *U.S.,* 351 F. 2d 318, 5th Cir. (1965), Cert. den., 384 U.S. 921, 86 S. Ct. 1370, 16 L. Ed. 2d 441 (1966).

Movant's contentions enumerated in issue number (4) above were extensively treated by the U.S. Court of Appeals for the Fifth Circuit in *U.S.* vs. *Edwards,* supra, in a case which is so similar in facts as to be completely applicable to Movant's contentions herein. There, the Fifth Circuit Court of Appeals decided the issue contrary to the claims of the Movant.

Movant was convicted on all six counts of the indictment on evidence which the Court of Appeals for the Fifth Circuit described as "overwhelming." Upon such conviction, he was subject to maximum imprisonment totalling thirty years and fines totalling fifteen thousand dollars. He, in fact, received a prison sentence of five years, three years probation and a fine of ten thousand dollars. His total punishment was well

within the maximum provided by law. It may be assumed that the trial court considered the nature and degree of the illegal acts of the Movant as well as his personal circumstances in imposing sentence and the fact that his sentence was more severe than the sentence imposed upon a codefendant who entered a plea of guilty, is no basis for disturbing the action of the Court at this time.

The fact that two witnesses who testified against the Movant at his trial were under indictment or threat of indictment, is a matter which goes to the weight to be given their testimony by the jury. The record reflects that both witnesses were available for cross-examination by counsel for the Movant and that, in fact, witness Shirley Bowman was questioned as to her status as a defendant by both defense counsel and counsel for the prosecution. It is not now known what, if any, weight was given to the testimony of these two witnesses by the jury but such testimony is not due to be stricken now. It might be noted once again that in affirming, the Court of Appeals noted that the evidence against this Movant was "overwhelming."

Movant, for the first time, makes the general assertion that evidence was admitted at trial which was obtained through illegal surveillance or illegal "Bugging" or illegal electronic devices in violation of the law. This allegation is a bare conclusion. He alleges no facts or circumstances which would tend to support the allegation and in no way informs the Court of any particular evidence to which he makes reference. On September 28, 1970, acting by and through his counsel, Movant filed a motion which was

entitled "Motion to Produce for Inspection" by which he asked to inspect and to copy, among other things, the following:

> 10. Notes, logs and/or transcriptions of any and all electronic surveillance conducted by any officer or agent of the United States during investigation resulting in the indictment in this case, or copies thereof, within the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the Government.
>
> 11. Any and all logs, notes, memoranda, copies, photographs of any surreptitious surveillance of the United States mails in connection with the investigation resulting in the indictment in this case, within the possession, custody or control of the Government, the existence of which is known, or by the exercise of due diligence, may become known to the attorney for the Government.

The question as to the existence or use of surveillance or "bugging" or use of electronic devices was judicially determined during the pretrial proceedings. If there was error, such error was available to the Movant on his appeal. He chose not to raise that issue on appeal and as was said above, a motion under Section 2255 is not a substitute for an appeal.

As to Movant's contention that use of the mails was incidental to his activities in obtaining Alabama divorces for non-residents of the State of Alabama, that question was also treated in *U.S.* vs. *Edwards,* supra, and it should suffice to say that the position taken by the Movant here was not sustained by the U.S. Court of Appeals for the Fifth Circuit.

Having carefully and thoroughly considered all the issues raised by the Movant and for the reasons above-stated, the Magistrate is of the opinion and recommends that the relief requested by the Movant should be denied.

DATED, this _____ day of October, 1974.

EDWIN L. NELSON,
U.S. Magistrate.

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